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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAVID STEPHEN QUINTERO, Defendant and Appellant.	H043519 (San Benito County Super. Ct. No. CR-11-01277)

Defendant David Stephen Quintero appeals from an order denying his request to reduce his 2012 sentence by striking the prior prison term enhancements imposed under Penal Code section 667.5, subdivision (b) (hereafter, section 667.5(b)).[1] Defendant contends that the trial court should have struck the enhancements because the crimes underlying those convictions have been redesignated as misdemeanors pursuant to section 1170.18 following the passage of Proposition 47. We conclude that Proposition 47 does not apply retroactively to require the striking of a properly imposed prison prior enhancement when the conviction underlying the enhancement is subsequently reduced to a misdemeanor. We must therefore affirm the order.

Background

After a jury trial, David Stephen Quintero was found guilty of assault with force likely to produce great bodily injury (former § 245, subd. (a)(1), making criminal threats (§ 422), and disobeying a court order (§ 166, subd. (a)(4)). On December 27, 2012, the

[1] All further statutory references are to the Penal Code except as otherwise stated.

trial court sentenced defendant to nine years eight months in prison. The sentence included two one-year terms under section 667.5(b), based on a 2001 felony conviction for possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and a 2004 felony conviction for passing a bad check (§ 476, subd. (a).) This court affirmed the judgment on December 12, 2014.

On January 27, 2016, defendant submitted a petition in propria persona, seeking reduction of his sentence under section 1170.18 by striking the enhancements from the record of judgment. The trial court interpreted the request to apply to the principal charges and found that they did not qualify for reduction under Proposition 47. Defendant then filed another petition, which the court denied on April 20, 2016. This appeal focuses on the second order.

Discussion

Defendant contends that it was error to deny his request to strike the enhancements. He asks this court to order the trial court to do so, thereby reducing his sentence by two years, because the crimes underlying those enhancements were redesignated as misdemeanors by the passage of Proposition 47. In his view, the voters who passed Proposition 47 must have intended that the law have retroactive effect, in order to promote the goals of the initiative—i.e., to allow the state's penal resources to be focused on "more serious criminal behavior" and invest the savings in prevention and support. Defendant thus urges a broad construction of section 1170.18, subdivision (k), which states that a resentenced or redesignated felony conviction be treated as a misdemeanor "for all purposes." This court, he argues, must recognize that the prior convictions underlying his section 667.5 enhancements are now misdemeanors and should order the lower court to strike them. We are unpersuaded.[2]

[2] This issue is currently pending before the Supreme Court. (*People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted March 30, 2016, S232900 (*Valenzuela*); *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted April 27, 2016, S233011;

1. Legal Background

a. The Prior Prison Term Enhancement of Section 667.5(b)

Section 667.5(b) imposes a one-year enhancement for committing an offense that leads to a felony conviction within five years of having been released from custody on another felony conviction. (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 740 (*Abdallah*).) "Sentence enhancements for prior prison terms are based on the defendant's status as a recidivist, and not on the underlying criminal conduct, or the act or omission, giving rise to the current conviction." (*People v. Gokey* (1998) 62 Cal.App.4th 932, 936.) The purpose of the section 667.5(b) prior prison term enhancement is " 'to punish individuals' who have shown that they are ' "hardened criminal[s] who [are] undeterred by the fear of prison." ' " (*In re Preston* (2009) 176 Cal.App.4th 1109, 1115.)

Historically, "[i]mposition of a sentence enhancement under . . . section 667.5 require[d] proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction. (*People v. Elmore* (1990) 225 Cal.App.3d 953, 956-957.)" (*People v. Tenner* (1993) 6 Cal.4th 559, 563.) The fourth requirement "is commonly referred to as the 'washout rule' " because "a prior felony conviction and prison term can be 'washed out' or nullified for the purposes of section 667.5 . . . if a defendant is free from both prison custody *and* the commission of a new felony for *any*

People v. Ruff (2016) 244 Cal.App.4th 935, review granted May 11, 2016, S233201; *People v. Williams* (2016) 245 Cal.App.4th 458, review granted May 11, 2016, S233539; *In re Larson* (Feb. 10, 2016, D068273) [nonpub. opn.], review granted April 20, 2016, S232839.) The lead case, *Valenzuela*, presents the following issue: "Is defendant eligible for resentencing on the penalty enhancement for serving a prior prison term on a felony conviction after the superior court had reclassified the underlying felony as a misdemeanor under the provisions of Proposition 47?" (<http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2135098&doc_no=S232900>[as of June 1, 2017].)

five-year period following discharge from custody or release on parole . . . ." (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1229.) Section 667.5(b) has been amended to account for prison realignment and the fact that some felony sentences are now served in county jail under subdivision (h) of Section 1170.[3] The basic prerequisites for its imposition, however, are unchanged.

b. Proposition 47

Voters enacted Proposition 47, "the Safe Neighborhoods and Schools Act," in November 2014. (Proposition 47, as approved by voters, Gen. Elec. (Nov. 4, 2014), eff. Nov. 5, 2014; see Cal. Const., art. II, § 10, subd. (a).) "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091 (*Rivera*).)

"Proposition 47 also created a new resentencing provision: section 1170.18." (*Rivera*, *supra*, 233 Cal.App.4th at p. 1092.) Under subdivision (a) of that provision, a person "currently serving" a felony sentence for an offense that is now a misdemeanor

[3] Section 667.5(b) now provides: "Except where subdivision (a) applies, where the new offense is any felony for which a prison sentence or a sentence of imprisonment in a county jail under subdivision (h) of Section 1170 is imposed or is not suspended, in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended for any felony; provided that no additional term shall be imposed under this subdivision for any prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody or the imposition of a term of jail custody imposed under subdivision (h) of Section 1170 or any felony sentence that is not suspended. A term imposed under the provisions of paragraph (5) of subdivision (h) of Section 1170, wherein a portion of the term is suspended by the court to allow mandatory supervision, shall qualify as a prior county jail term for the purposes of the one-year enhancement."

under Proposition 47 may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. (§ 1170.18, subd. (a).) Where a petitioner satisfies the criteria in section 1170.18, the court must recall the petitioner's felony sentence and resentence him or her "to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) Under section 1170.18, subdivisions (f) and (g), a person who has completed a felony sentence for an offense that would now be a misdemeanor under Proposition 47 is entitled to have his or her felony conviction designated as a misdemeanor upon filing an application with the trial court.

Subdivision (k) of section 1170.18 provides that "[a]ny felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6." (The "Chapter 2" mentioned in section 1170.18, subdivision (k) refers to §§ 29800 to 29875, which contain prohibitions on firearm access by persons with certain criminal convictions.) The foregoing remedial procedures are available for a limited time: "Any petition or application under this section shall be filed within three years after the effective date of the act that added this section or at a later date upon a showing of good cause." (Former § 1170.18, subd. (j).)

c. Principles of Statutory Construction

A statutory provision created by voter initiative is construed according to the same principles as those enacted by the Legislature. (*People v. Rizo* (2000) 22 Cal.4th 681, 685; *Rivera, supra*, 233 Cal.App.4th at p. 1099.) Our fundamental task is to determine the intent of the voters so as to effectuate the purpose of the law. (*In re Littlefield* (1993) 5 Cal.4th 122, 130.) "If the language is unambiguous and a literal construction would not

result in absurd consequences, we presume that the voters intended the meaning on the face of the initiative and the plain meaning governs. [Citations.] If the language is ambiguous, we may consider the analyses and arguments contained in the official ballot pamphlet as extrinsic evidence of the voters' intent and understanding of the initiative." (*Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1316-1317.) The provision is ambiguous "if it is susceptible of two reasonable interpretations." (*People v. Dieck* (2009) 46 Cal.4th 934, 940.)

2. Application of Proposition 47 to Defendant's Sentence Enhancements

Defendant contends that he is entitled to have his two section 667.5(b) enhancements struck, thus reducing his total term by two years, because the underlying felony convictions (from 2001 and 2004) are now "misdemeanors for all purposes" under section 1170.18, subdivision (k); consequently, he believes, "their continued use as felony prison priors was unlawful." Defendant acknowledges that he is seeking to apply section 1170.18, subdivision (k), retroactively; he maintains, however, that "if the voters [had] intended that this section not have retroactive effect, the voters, just as with the Legislature, are presumed to know how to draft that into the Proposition. Thus, the answer should be that the voters did so intend retroactive effect." He relies for this theory on *People v. Flores* (1979) 92 Cal.App.3d 461, 470 (*Flores*), and *People v. Park* (2013) 56 Cal.4th 782, 795 (*Park*). He also cites *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, 1227 (*Alejandro N.*). Those cases do not advance defendant's position.

In *Park*, the California Supreme Court construed the pertinent language in section 17, subdivision (b) and concluded that "the reduction of the offense to a misdemeanor does not apply retroactively." (*Rivera, supra,* 233 Cal.App.4th at p. 1100.) The court stated: "From the decisions addressing the effect and scope of section 17(b), we discern a long-held, uniform understanding that when a wobbler is reduced to a misdemeanor in accordance with the statutory procedures, the offense *thereafter* is

deemed a 'misdemeanor for all purposes,' except when the Legislature has specifically directed otherwise." (*Park, supra,* 56 Cal.4th at p. 795, italics added.) The court noted that "[t]he language of section 17 added in 1874 . . . gave rise to the . . . rule that if the court exercised its discretion by imposing a sentence other than commitment to state prison, the defendant stood convicted of a misdemeanor, but only from that point forward; classification of the offense as a misdemeanor did not operate retroactively to the time of the crime's commission, the charge, or the adjudication of guilt." (*Id.* at p. 791, fn. 6.)

Defendant's reliance on *Park* is misplaced. In *Park*, the defendant's wobbler had been reduced to a misdemeanor "before defendant committed the current crimes," let alone was convicted and sentenced. (*Park, supra*, 56 Cal.4th at p. 787.) By contrast, here defendant's convictions were designated misdemeanors *after* sentencing for the current offense. Therefore, *Park* is distinguishable. Defendant's reliance on *Flores* is misplaced for the same reason. (*Flores, supra*, 92 Cal.App.3d at pp. 464, 470, 474 [where 1966 conviction became a misdemeanor in 1975, it could not serve as the basis for a prior prison term enhancement when defendant was sentenced for a 1977 crime].)[4]

The critical statutory language at issue is the phrase "shall be considered a misdemeanor for all purposes." (§ 1170.18, subd. (k).) A very similar phrase is found in section 17, subdivision (b), which states in part: "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, *it is a misdemeanor for all purposes* under the following circumstances: . . . ." (Italics added.) "Generally, the drafters who frame an initiative statute and the voters who enact it may be deemed to be aware of the judicial construction

[4] *Alejandro N.* is also inapposite, That case considered whether the redesignation of a felony as a misdemeanor requires expungement of the offender's DNA and profile from the state database.

of the law that served as its source. [Citation.]" (*In re Harris* (1989) 49 Cal.3d 131, 136 (*Harris*).) Accordingly, there arises a presumption that, like section 17, subdivision (b), section 1170.18, subdivision (k) applies prospectively. (*People v. Weidert* (1985) 39 Cal.3d 836, 845-846 ["Where the language of [an initiative] statute uses terms that have been judicially construed, ' "the presumption is almost irresistible" ' that the terms have been used ' "in the precise and technical sense which had been placed upon them by the courts." ' "]; *Rivera, supra*, 233 Cal.App.4th at p. 1100 ["[w]e presume the voters 'intended the same construction' for the language in section 1170.18, subdivision (k), [as in section 17, subdivision (b)] 'unless a contrary intent clearly appears' "].)

Read as a whole, section 1170.18 clearly indicates that the remedial mechanisms provided in Proposition 47 were not intended to result in the automatic, retroactive invalidation of any term that is part of a sentence imposed in a final judgment. The retroactive effect of the statutory changes reducing offenses to misdemeanors is carefully circumscribed by section 1170.18. The use of the "misdemeanor for all purposes" language in section 1170.18, subdivision (k), which is almost identical to the judicially construed language in section 17, subdivision (b), suggests that the drafters and the voters intended it to be similarly applied—that is, applied prospectively.[5] We also find it significant that Proposition 47 does not set forth a procedure for striking a section 667.5 enhancement where the underlying conviction has been designated a misdemeanor pursuant to section 1170.18, subdivision (g). The *judicial* creation of such a mechanism would contravene section 1170.18, subdivision (n), which provides that "[n]othing in this and related sections is intended to diminish or abrogate the finality of judgments in any

[5] In resolving a question of appellate jurisdiction in *Rivera*, this court considered the effect of the language "shall be considered a misdemeanor for all purposes" in section 1170.18, subdivision (k). (*Rivera, supra*, 233 Cal.App.4th at p. 1089.) Based on the substantially similar language in section 17, subdivision (b), this court presumed that "the phrase 'shall be considered a misdemeanor for all purposes' in section 1170.18, subdivision (k) does not apply retroactively." (*Rivera, supra*, at p. 1100.)

case not falling within the purview" of Proposition 47[6] The drafters of the proposition could easily have added such a provision, but they did not. The omission may well have been intentional, since "[t]he purpose of section 667.5 is to impose additional punishment upon a felon whose prior prison term failed to deter him or her from *future* criminal conduct." (*People v. Medina* (1988) 206 Cal.App.3d 986, 991.)

Nothing in the proposition's uncodified provisions or the ballot materials suggests a different conclusion. Proposition 47 declares the purposes and intents of the California voters in enacting the proposition. Two of Proposition 47's stated purposes are to "[a]uthorize *consideration* of resentencing for anyone who is currently serving a sentence for any of the offenses" that would be made misdemeanors by Proposition 47, and to "[r]equire a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, subds. (4), (5), p. 70, italics added.) Voters were assured that "*Proposition 47 does not require automatic release of anyone.* There is no automatic release. It includes strict protections to protect public safety and make sure rapists, murderers, molesters and the most dangerous criminals cannot benefit." (*Id*., rebuttal to argument against Prop. 47, p. 39.)

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[6] An altogether different situation exists if, before the effective date of Proposition 47, a defendant was convicted of only felonies, which were subsequently reclassified as misdemeanors under Proposition 47, and the defendant's sentence included a one-year prior prison term enhancement. In that scenario, if the court resentences the defendant to only misdemeanors pursuant to a petition for recall of sentence (§ 1170.18, subds. (a), (b)), it would appear that the defendant would not be convicted of a new felony offense as required to impose a one-year prior prison term enhancement (§ 667.5(b)). A related issue arose in *Abdallah*, which concluded that a one-year prior prison term enhancement could not be imposed in that case because, before sentencing in that case, a prior felony conviction had been reduced to "a misdemeanor for all purposes" when the defendant was resentenced in an earlier case (§§ 667.5(b), 1170.18, subd. (k)), and, consequently, the defendant had remained free of both prison custody and the commission of a new offense that results in a felony conviction for five years (§ 667.5(b)). (*Abdallah*, *supra*, 246 Cal.App.4th at p. 746.)

The declaration in no way suggests an intent to automatically render invalid any part of a final sentence still being served.

Neither the "Official Title and Summary" regarding Proposition 47 prepared by the Attorney General nor the analysis of the proposition prepared by the Legislative Analyst suggests that any of its provisions would automatically render invalid any part of a final sentence still being served. That analysis of Proposition 47 set forth in the Voter Information Guide for the General Election of November 4, 2014 states: "This measure reduces penalties for certain offenders convicted of nonserious and nonviolent property and drug crimes. The measure also allows certain offenders who have been previously convicted of such crimes to apply for reduced sentences." (Voter Information Guide, analysis of Prop. 47 by the Legislative Analyst, p. 35.) It explains: "This measure allows offenders currently serving felony sentences for the above crimes to apply to have their felony sentences reduced to misdemeanor sentences. In addition, certain offenders who have already completed a sentence for a felony that the measure changes could apply to the court to have their felony conviction changed to a misdemeanor. However, no offender who has committed a specified severe crime could be resentenced or have their conviction changed. In addition, the measure states that a court is not required to resentence an offender currently serving a felony sentence if the court finds it likely that the offender will commit a specified severe crime. Offenders who are resentenced would be required to be on state parole for one year, unless the judge chooses to remove that requirement." (*Id*., p. 36.)

We thus find no statutory basis for reversal of the trial court's order. The designation of defendant's 2001 and 2004 convictions as misdemeanors pursuant to section 1170.18 did not retroactively invalidate the trial court's earlier imposition of section 667.5(b) enhancements based on those convictions.

Disposition

The order is affirmed.

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ELIA, ACTING P. J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.

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